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No. 365

In the Supreme Court of the United States

October Term, 1958.

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner*,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faherty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, nee Wright, and Mary Ellen Cash, *Respondents*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND SUPPORTING BRIEF.

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IN THE SUPREME COURT OF THE UNITED STATES.

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No. .....

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner,*

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faherty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, nee Wright, and Mary Ellen Cash, *Respondents.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, ~~AND SUPPORTING BRIEF~~.

Petitioner, Donald George Fleming, a minor, in person and by Leona Holcomb, as guardian of the person and estate of Donald George Fleming respectfully pray certiorari to the United States Court of Appeals, Tenth Circuit, to review a decision and order denying rehearing entered in

cases No. 5620 and 5621, wherein said court affirmed permanent injunctions entered by the United States District Court for the Northern District of Oklahoma, against further prosecution of a suit at law pending in the District Court of Tulsa County, Oklahoma, styled Leona Holcomb, et al., vs. Aetna Life Insurance Company, et al., No. 87,402, filed April 15, 1954, said suit being one for damages for the unlawful conversion on October 31, 1950, of certain United States Government Bonds having a then market value of $191,864.64 and to which suit the respondents here were parties.

A. Opinion of the Court Below.

The Opinion delivered in the United States Court of Appeals, Tenth Circuit, is reported at 255 F. (2d) 577.*1

B. Grounds On Which Jurisdiction of this Court is invoked.

The judgment and decree complained of was entered May 12, 1958. The Petition of Donald George Fleming for Rehearing was timely filed June 2, 1958, and by said court denied June 20, 1958. By order of June 27, 1958, Mandates of the United States Court of Appeals were stayed for a period of thirty days from June 29, 1958, under provisions of paragraph 3, Rule 28, and by order of July 25, 1958, and said mandates were further stayed until Sept. 18, 1958, under the provisions of paragraph 3, Rule 28.

Jurisdiction of this court to issue certiorari is invoked under 28 U.S.C.A. 1254, which reads:

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*1. For copy see Appendix, pages 19-31.

"Cases in courts of appeal may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *;"

and 28 U. S. C. A. 2101, sub-paragraph c, which reads:

"Any * * * writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree * * *."

"Time within which application could be made for review in the Supreme Court did not begin to run until after disposition of motion for new trial seasonably filed and entertained." *U. S. vs. Seminole Nation*, 1937, 57 S. Ct. 2833, 299 U. S. 417, 81 L. Ed. 3316; *Gypsy Oil Co. v. Escoe*, 48 S. Ct. 112, 275 U. S. 492, 72 L. Ed. 393.

C. Questions Presented for Review.

I

Where at a pre-trial conference, under Federal Rules of Civil Procedure, Rule 16, 28 U.S. C. A.[*2] *a federal court, without trial, evidence, findings of fact or conclusions of law enters a permanent injunction against prosecution of a state court action for damages, which is pending undetermined in the state court, does the entry of such an injunction.*

(a) Violate Art. 3, Sec. 2, Cl. 1 of the U. S. Constitution by extending federal judicial authority under interpleader statutes to include power to enjoin prosecution of a prior state court suit otherwise within the exclusive constitutional jurisdiction of the state court?

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*2. For rule in full see Appendix, page 31.

(b) Constitute denial of due process of law under the Constitution of the United States (Amend. V.)?

(c) Violate 28 U. S. C. A. 2283?

II

Where a minor devisee under a will has instituted a state court action for damages for the conversion of U. S. Bonds which constituted part of his testatrix's estate, in an action thereafter instituted in the federal court under 28 U.S.C.A. 1335, has the federal court jurisdiction to enjoin prosecution of the state court suit by a person who was not a party to the insurance policy upon which the denominated interpleader action was based and to enjoin prosecution of such suit against persons who are not parties to or claimants under such insurance policy or contract?

III

In an action instituted in the federal court under 28 U.S.C.A. 1335, where it affirmatively appears that there was no contest respecting liability of the insurer under its policy contract which was incontestable by its terms, has the federal court jurisdiction to summarily enjoin, without trial, evidence, findings of fact or conclusions of law, prosecution of a pending state court action for damages for conversion of U. S. Bonds which are alleged to have constituted assets of an estate in which plaintiff in the State Court suit was interested as devisee under a will?

IV.

In actions instituted in the federal court, purporting to be in the nature of interpleader under 28 U. S. C. A. 1335, where the record affirmatively discloses that by

their terms the insurance contracts in question are incontestable, that there is or has been no controversy among the beneficiaries under the insurance contracts, or any of them, concerning any of the terms or conditions of the policies, or the liability of the insurer, may the federal court, at pre-trial conference, without evidence to show existence of a suit in the nature of interpleader and of which the federal court has jurisdiction, and without findings of fact or conclusions of law, summarily enjoin prosecution by a minor devisee under a will of a pending state court suit for damages for conversion which constituted part of his testatrix's estate, on the theory that the judgment on such feigned and fictitious issues in interpleader suit is res judicata of issues pending undetermined in a state court of competent jurisdiction, where in the state court suit there has been no removal and the suit is not removable because of lack of diversity of citizenship of the parties thereto?

E. Statement of the Case.

Following the death of a maternal great-aunt, under whose will the petitioner is a beneficiary, petitioner discovered that on October 31, 1950, while the testatrix was incapacitated and helpless at Sapulpa, Oklahoma, a step-great-uncle, J.A.R., aided and abetted by others, surreptitiously and secretly entered the private safety deposit box of testatrix in Oklahoma City and took therefrom and converted into cash securities having then a market value of $191,864.64. Petitioner by his guardian filed in the District Court of Tulsa County, Oklahoma, cause No. 87,402 for damages.*3 This suit remains pending in said court undetermined.

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*3. For copy of petition in full see Appendix, page 32.

Instead of answering to the merits in said state court suit, Aetna Life Insurance Company, one of the defendants therein, filed in the U. S. District Court for the Northern District of Oklahoma, two separate suits, in each of which the petitioner here was designated as a defendant, the true object of each of which cases was to obtain an injunction to prevent prosecution of said cause No. 87,402, or any like suit in the state court.

The state court suit was not removable because there was no diversity of citizenship between the parties, neither has a petition or other proceeding for removal ever been undertaken.

Federal jurisdiction was invoked on basis of an allegation that a portion of the proceeds of the bonds converted found its way into the hands of Aetna Life Insurance Company, for which it issued an annuity described in the proceedings as Policy No. An 33409, to which annuity contract this petitioner was not a party. It is not contended that this petitioner was directly or indirectly a party to the annuity contract with Aetna or that he had any interest, directly or indirectly, in the issue of Aetna's liability under said contract.

Apparently, realizing the inadequacy of said cause No. 3502 as a basis of jurisdiction to enjoin prosecution by this petitioner of cause No. 87,402, or any like action in the state court, Aetna also filed in the U. S. District Court another and different cause of action against this petitioner as No. 3503, Civil. Therein it premised federal jurisdiction in an action in the nature of interpleader upon an allegation that before conversion of the bonds in controversy

Aetna had issued another and different insurance policy No. N1664203, an endowment policy, payable solely and only to this petitioner upon his reaching the age of twenty-six years. It was alleged that a portion of the proceeds from the bonds converted was used to pay a single premium of $23,143.03 upon the second policy.

At pre-trial an unsuccessful effort was made to point out to the trial court the circumstance that the policies in controversy were each incontestable by their specific terms; that by their specific terms a contest on the ground that premiums had been paid if such was true from misappropriated funds was expressly precluded; that petitioner here was not a party to the first contract and that the alleged annuitants named in the first suit were not parties to the endowment policy upon which the second suit was based. Since the insurance company failed to plead and no litigant asserted any ground which, upon the face of the record, would absolve the insurance company from liability under the express terms of its incontestable policies, and no circumstance or fact was averred to indicate controversy concerning obligations of the insurer or which would impose double liability upon it under the terms of its contracts, this petitioner, joined by others similarly situated, asserted that there was no cause of action in the nature of interpleader vesting jurisdiction in the federal court; that absent evidence to show such cause of action the only court of competent jurisdiction to try the issues in cause No. 87,402, was the state court in which said suit was pending.

These contentions, made by appropriate preliminary pleadings, by answer and at pre-trial, the federal court disregarded. Thereupon at said pre-trial, without evidence, trial, findings of fact or conclusions of law, the court summarily entered an order in each of said suits purporting to be a judgment in interpleader, finding the facts concerning liability of the insurer as at all times agreed upon by all parties. The federal court then entered permanent injunctions in each of said cases, enjoining this petitioner from the prosecution of cause No. 87,402.

Issuance of each injunction under the circumstance was assailed by motions for new trial and on affirmance in the appellate court by Petition for Rehearing without avail.

Petitioner's complaint here is that feigned and fictitious issues purporting to be in suits in the nature of interpleader have been wrongfully used as a basis of federal jurisdiction to sustain not merely one, but *two* injunctions in two separate suits. Both suits were calculated to prevent prosecution by this petitioner of his state court suit.

Petitioner's sole and only connection with the transactions complained of in both federal court suits was that at 11 years of age he was induced to sign an application for an insurance policy.*4

F. Reasons Relied Upon for Certiorari.

The discretionary power of this the Supreme Court of the United States, to issue certiorari is invoked under

*4. For copy see reproduction at end of Appendix.

Rule 19-B, upon the ground that the United States Court of Appeals for the Tenth Circuit, has so far departed from the accepted and usual course of judicial procedure and so far sanctioned such a departure by the lower court as to call for the exercise of this court's power of supervision.

The opinion complained of herein concedes diversity of opinions between that in the instant case and the rule announced in *Lowther* v. *New York Life Ins. Co.*, 8 Cir., 278 Fed. 405, wherein the rule was announced that a federal court may not permanently enjoin a prior state court suit in an interpleader action. The Tenth Circuit attempts to dispose of this contention in the following language:

> "Suffice to say that that case interpreted law in effect in 1922 and the clear language of 28 U.S.C.A. 2361 authorizes the permanent injunction in an interpleader matter."

The Circuit Court overlooks or disregards the circumstnces that the relative jurisdiction of state and federal courts stems from the Constitution; assumes that 28 U.S. C.A. 2361 enlarges federal jurisdiction by vesting in federal courts power to enjoin and, thereby, supersede prior jurisdiction constitutionally vested in a state court.

The question is of great and general public interest, for if state court jurisdiction in pending damage suits for conversion may be defeated by instituting a denominated federal court suit in interpleader, on the theory that the tortious converters of property are entitled to equitable relief to determine, *inter se*, how the spoils are to be divided, or some closely related question, an ingenious

method has been devised for transferring jurisdiction to determine pending cases from state to federal courts, even in cases neither removable nor removed from the state courts.

The Tenth Circuit has approved such a clear usurpation and abuse of jurisdiction and authority by a federal district court as to constitute special and important reasons justifying this court in the exercise of sound judicial discretion in granting certiorari.

A review of the record discloses that there neither was nor could be a justiciable issue either in interpleader or in the nature of interpleader for consideration of the federal court.

The record discloses without dispute that the insurance policies upon which federal jurisdiction was premised were by their express terms incontestable.

There was no dispute among the beneficiaries concerning the terms or conditions of either policy.

Aetna Life Insurance Company was not in danger of being subjected to double liability or to conflicting claims arising under either policy.

Jurisdiction to determine the question of whether or not certain registered United States Bonds had been secretly taken from the private safety deposit box of the testatrix on Oct. 31, 1950, was vested by law in the state court prior to the filing of any federal court suit. There was no diversity of citizenship, or fraudulent joinder, or petition to remove that suit, so that clearly federal jurisdiction to

determine the issues therein was under the constitution vested exclusively in the state court.

Institution of the federal court suits was but a ruse and device to circumvent prosecution of cause No. 87,402 in the state court, thereby evading not only trial by jury, but any trial conformable to the laws of the State of Oklahoma.

In the federal court, no effort was made to show by evidence at any trial that an action in the nature of interpleader existed.

Certain interveners on their application were by court order made parties in the federal court proceeding. These interveners were not parties directly nor indirectly to either of the insurance policies upon which the interpleader juisdiction was premised. The interveners offered no evidence, and made no attempt to show any plausible theory upon which the federal court had jurisdiction to afford them relief. The petitioner here in the most positive and unequivocal terms possible, and by pleadings expressly denied all claims of Aetna and interpleaders for relief in the federal court, as a matter of law, and with equal positiveness denied any factual basis for such relief.*

With the record in this situation, the district court, without trial, evidence, findings of fact or conclusions of law, and without attempting to determine the issues raised in cause No. 87,402 disposed of the state court action as to all parties by a permanent injunction preventing further prosecution of the suit by or against any party thereto.

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* For transcript of pre-trial record so showing and decrees entered in district court, see Appendix, pages 43-61.

Assuredly there is no presumption that interveners in a federal court are entitled to injunctive relief where neither pleadings, evidence, findings of fact or conclusions of law even remotely tends to sustain their right to an injunction.

The United States Court of Appeals incorporates in its opinion extensive recitations respecting issues of fact and law which were alien to the record and disregards such obvious facts that under the pleadings the sole issue for determination in the federal court was whether entry of two injunctions against prosecution by this petitioner, among others, of cause No. 87,402 was in all the circumstances within the jurisdiction of the federal court.

The statement that "the court has the power to compel the parties to agree to all facts concerning which there can be no real issue," disregards the record and ignores the right of litigants to a trial of issues. The district court made no order at any time attempting "to compel the parties to agree" to any facts.

The issue in cause No. 87,402 remain undisposed of in a state court. There has been no trial of the case.

It's difficult to escape the conclusion that unless this court intervenes, a means has been discovered whereby tort-feasors may escape consequences of their fraudulent acts without so much as swearing a witness in any court through the simple process of filing a denominated interpleader suit in a federal court and obtaining a summary injunction.

The proceedings in the federal court creates unseemly conflict between state and federal courts for as stated the state court suit remains pending undisposed of on the dockets.

Federal courts, and particularly courts of equity, should not be used as a refuge and hiding place for protection of wrongdoers.

Certiorari is warranted to confine jurisdiction of federal courts to the limits prescribed by law under the rules announced in the cases of:

Mansfield, etc., R. Co. v. *Swan*, (Ohio, 1884) 111 U. S. 379, (4 S. Ct. 510, 28 L. Ed. 462);

King Iron Bridge, etc., Co. v. *Otoe County*, (Neb. 1887) 120 U. S. 225 (7 S. Ct. 552, 30 L. Ed. 623);

Cameron v. *Hodges*, (Tenn. 1888) 127 U. S. 322 (8 S. Ct. 1154, 32 L. Ed. 132) • • •.

Parker v. *Ormsby*, (Neb. 1891) 11 S. Ct. 924, 141 U. S. 81, 35 L. Ed. 654.

Absence of federal jurisdiction to dispose of pending state court case 87,402 by an injunction in all the circumstances appears so obvious that this Court under the rule announced in *King Iron Bridge, etc., Co.* v. *Otoe County supra*, is authorized to deny jurisdiction of the court from which the record comes, of its own motion.

D. Constitutional and Statutory Provisions Involved.

The United States District Court for the Northern District of Oklahoma entered judgment in both cases without trial and filed and entered no findings of fact or conclusions of law.

This constituted a violation of *U. S. Const. Amend. V*, which so far as material reads

> "No person shall be * * * deprived of * * * property without due process of law * * *."[6]

And that court further disregarded Art. 3, Sec. 2, cl. 1, of the U. S. Const. relating to the judicial power of the federal court which reads

> "The judicial power shall extend * * * to controversies * * * between citizens of different states * * *."[7]

28 U. S. C. A. 1397 dealing with interpleader, reads:

> "Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be bought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 646, 62 Stat. 936."

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[6] U. S. Const., Amend. V, in full reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[7] Art. 3, Sec. 2, cl. 1, in full reads:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United tates shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Related to the foregoing statutes is 28 U.S.C. A. 1332, governing federal jurisdiction, which vests such jurisdiction in the following words:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between
>
> (1) Citizens of different States;
>
> (2) Citizens of a State, and foreign states or citizens or subjects thereof;
>
> (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
>
> (b) The word "States," as used in this section, includes the Territories and the District of Columbia. June 25, 1948, c. 648, 62 Stat. 930."

To sustain the injunctions, the Court of Appeals premised its conclusions upon the clear language of 28 U.S.C.A. 2361, which the Opinion asserts "authorizes the permanent injunction in an interpleader matter."[8]

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[8] The federal statute referred to is quoted in full as follows:

"Sec. 2361. *Process and Procedure.* In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970; amended May 24, 1949, c. 139, Sec. 117, 63 Stat. 105."

The Court of Appeals found federal jurisdiction vested under 28 U. S. C. 1335.*9

The Circuit Court disregarded 28 U.S.C.A. 2283, expressly limiting federal jurisdiction to enjoin proceedings in a State court This statute reads:

> STAY OF STATE COURT PROCEEDINGS — 28 U.S.C.A. 2283.
>
> "A court of the United States *may not grant an injunction to stay proceedings in a state court* except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." June 25, 1948, c. 646, 62 Stat. 968. (Emphasis supplied.)

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*9. "(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate policy of insurance, or other instrument of value or amount of 500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931."

Related to the foregoing sections of U.S.C.A. is *Rule 22 Federal Rules of Civil Procedure.*[*10]

Where lower federal courts have entertained suits of which they have no jurisdiction as federal courts, the jurisdiction of the Supreme Court on certiorari is to correct their errors in assuming jurisdiction. *Lion Bonding, etc., Co.* v. *Karatz,* (1923) 43 S. Ct. 641, 262 U. S. 640, 67 L. Ed. 1151.

An important federal constitutional question justifies certiorari. *In re Murchison,* U. S. Mich. 1955, 75 S. Ct. 623, 349 U. S. 133, 99 L. Ed. 942.

There are special and important reasons authorizing certiorari, reaching constitutional dimensions in the case at bar within the rule set forth in *Rice* v. *Sioux City Memorial Park Cemetery,* U. S. Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897.

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*10. "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joineder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or, that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joined of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C., Secs. 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, effective Oct. 20, 1949."

"It is the duty of the Supreme Court to ascertain from the record whether the court below could properly take jurisdiction." *Great Southern Fire Proof Hotel Co.* v. *Jones,* (Ohio) 20 S. Ct. 690, 177 U. S. 449, 44 L. Ed. 842.

For the reasons stated, it is respectfully submitted that the writ of certiorari should issue.

Respectfully,

GLENN O. YOUNG,
Sapulpa, Oklahoma
Attorney for Petitioner

Glenn A. Young,
David Young, and
John W. Young,
All of Sapulpa, Oklahoma,
of Counsel.

APPENDIX

Exhibit 1.

Opinion of the United States Court of Appeals,

Filed United States Court of Appeals, Tenth Circuit, May 12, 1958. Robert B. Cartwright, Clerk.

United States Court of Appeals, Tenth Circuit.
May Term 1958.

No. 5620

LEONA HOLCOMB, individually; LEONA HOLCOMB, as Guardian of the person of DONALD GEORGE FLEMING, a minor; DONALD GEORGE FLEMING, a minor; FRANK T. DENHAM; MAY CECILIA RENHAM; DOROTHY LEE DENHAM, a minor; CAROLYN DENHAM LUMLEY; MAY CECILIA DENHAM as Guardian of DOROTHY LEE DENHAM, a minor; GEORGE DENHAM; CLARENCE DENHAM; MARY JANE HOPKINS, nee Wright; and MARY ELLEN CASH, *Appellants,*

vs.

AETNA LIFE INSURANCE COMPANY, a corporation; FRANCIS X. RETTENMEYER, Executor of the Estate of JOSEPH A. RETTENMEYER, deceased; F. E. PENCE; VIRGIL F. SPRANKLE; GROVER D. STROTHER; A. N. MURPHY; JUSTIN W. FAHERTY and FIRST NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, *Appellees.*

No. 5621

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB as Guardian; MARY JANE HOPKINS; FRANK T. DENHAM; MAY CECILIA DENHAM; DOROTHY LEE DENHAM, a minor; CAROLYN DENHAM LUMLEY; MAY CECILIA DENHAM as Guardian of DOROTHY LEE DENHAM, a minor; GEORGE DENHAM; CLARENCE DENHAM and LEONA HOLCOMB, individually, *Appellants*,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, and F. E. PENCE, *Appellees*.

Appeals From The United States District Court For The Northern District of Oklahoma

Glenn O. Young (John W. Young, David Young and Glenn A. Young were with him on the brief) for Appellants.

Robert J. Woolsey (J. C. Farmer, Otho Flippo and J. B. Bailey of Farmer, Woolsey, Flippo & Bailey were with him on the brief) for Appellee Aetna Life Insurance Company.

Philip M. Landa for Appellee, F. E. Pence.

Sam T. Allen III (Moraul Bosonetto was with him on the brief) for Appellee, Francis X. Rettenmeyer.

Joe Sharp and Robert D. Looney (Bryan W. Tabor of Rucker, Tabor & Cox; Robert D. Hudson of Hudson, Hudson & Wheaton; Looney, Watts, Looney & Nichols; and Joseph Rucks of Cochran, Dudley, Fowler, Rucks, Baker & Jopling, were with him on the brief) for Appellees First National Bank and Trust Company, et al.

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

LEWIS, Circuit Judge.

Appellants have been subjected to an adverse judgment rendered summarily after pre-trial w ich judgment includes a permanent injunction prohibiting 'em from further prosecution of asserted claims against appellees now pending or potential in the state courts of Oklahoma. The instant action is one of interpleader and its nature premises the trial court's ruling that the federal court provides the proper forum for the determination of the various issues interwoven through the claims of all the parties. Upon appellants' failure and refusal at pre-trial to tender those issues asserted by them against appellees in a pending state court suit the trial court took its summary action.

Aetna Life Insurance Company instituted this action in interpleader by filing a complaint in the District Court for the Northern District of Oklahoma alleging that the company had entered into a single premium annuity contract with Rosa B. Wright Rettenmeyer during her lifetime; that Mrs. Rettenmeyer had since died and that by the terms of the contract the company was then obligated to pay the continuing benefits to the contingent beneficiaries named in the agreement that the beneficiaries asserted such contract rights to be valid and binding upon the company; that certain of the heirs[1] of Mrs. Rettenmeyer had by the instigation of an action in the state courts of

1. Since this litigation has been in progress since 1954 changes in named parties plaintiff and defendant in various actions have been necessitated by death and successions; some actions instituted in the Oklahoma state courts have been dismissed, others initiated. We do not consider it necessary to detail the transition of parties and actions nor to refer to the parties by name except in occasional instances. Appellants claim as heirs of Mrs. Rettenmeyer and will be referred to as such.

Oklahoma *attacked the validity of the annuity contract* and were asserting the claim that Aetna, acting in concert with others, had through fraud and connivance practiced upon Mrs. Rettenmeyer converted certain of Mrs. Rettenmeyer's funds constituting the *equivalent of the premium payments received by Aetna.* Pointing to the existence of but a single liability but the possibility of being required, if separate suits prevailed, to disgorge the consideration of the *annuity contract* yet pay its benefits, Aetna named the heirs of Mrs. Rettenmeyer and the beneficiaries of the contract as defendants and sought relief in interpleader. The trial court issued a temporary injunction prohibiting the defendants from initiating or prosecuting any action against Aetna which touched the subject matter of the complaint in interpleader. The validity of this action of the trial court together with concomitant jurisdictional questions was tested and upheld by earlier appeal to this court, 228 F. 2d 75, wherein it was held that the controversy presented "justiciable questions appropriate for determination in an action in the nature of interpleader" and "questions which cannot be adjudicated with finality and conclusiveness as to all parties in interest in either of the cases pending in the state courts." Certiorari to the United States Supreme Court was denied, 76 S. Ct. 473, and the cause was returned to the District Court for further proceedings.

Subsequent to this remand, Aetna *filed its complaint* in the companion case here under consideration, alleging

substantially the same bases for interpleader as to an endowment contract *bought at the same* time by *Mrs. Rettenmeyer* upon the life of Donald George Fleming. It was asserted that the balance of the proceeds from the purportedly converted bonds paid the premium upon this policy. The issues before the trial court and before this court are controlled by *virtually the same facts* and the *same law* and require no separate discussion.

Timely petitions for leave to intervene were filed by those persons other than Aetna who appellants asserted had participated in the conversion of Mrs. Rennenmeyer's bonds. Leave was accordingly granted and those parties are now included as present appellees.[2]

Notwithstanding the earlier holding of this court as expressed in the opinion of Chief Judge Bratton, *supra*, that a justicable issue in federal interpleader existed as to "whether or not Aetna should be required to part with the premiums received by them for the annuity contract because of a conversion of Mrs. Rettenmeyer's bonds as asserted by appellants in the state court action, *appellants refused to tender this issue at the pre-trial conference*. To the contrary, counsel for appellants expressly stated that no claim was made relative to the obligation of Aetna under the contracts in opposition to payment to the beneficiaries' in accord with the contract terms. The trial court, after careful explanation of the posture of the case and

2. Some but not all of the appellant heirs are also beneficiaries of the annuity contract.

the consequence of the position adopted by the parties, found that no issue of fact existed which was determinative of the issues properly present in the interpleader and rendered summary judgment accordingly. To support the summary disposition of the controversy the trial court expressly found the uncontroverted (in law) fact to be that the property asserted by appellants to have been converted by Aetna from the lifetime estate of Mrs. Rettenmeyer was the same property received by Aetna as consideration for its contracts. In this regard appellants now question first the power of the court to determine a question of fact at pre-trial and second the validity of the particular finding that the proceeds of the bonds allegedly converted paid the premium on the insurance policies. This question is vital to the determination of whether interpleader will lie as it must necessarily settle the issue of whether the conversion alleged in the state court action is sufficiently related to the contracts before the court to constitute a single transaction giving rise to a single liability.

The prior appeal of this case recognized that this issue was before the court to be determined on trial as to the annuity policy. As to the endowment policy, the complaint states ,

> "Plaintiff alleges further that its liabilities under said policy or its transactions with Rosa B. Wright Rettenmeyer can be fully determined and decided upon the issues presented by its complaint for declaratory judgment avoiding a multiplicity of suits for the reason that should the guardian of Donald George Fleming and the defendants other than Donald George

Fleming prevail in the action and recover the monies paid for the premium by Rosa B. Wright Rettenmeyer, still the plaintiff might be faced with a suit by Donald George Fleming to enforce the contract of insurance . . ."

The issue before the court was precisely the one giving rise to an interpleader action and its determination cannot be circumvented by a *refusal on the part of a party to offer any evidence.*

The purpose of pre-trial conferences is to simplify the issues and eliminate waste of time and money by avoiding unnecessary proof of facts at the trial. *McDonald* v. *Bowles* (9 Cir.) 152 F. 2d 741. Where at pre-trial admissions and pleadings show that no issue of fact remains to be determined, the court has the power to decide the questions of law and enter summary judgment thereon, 22 A.L.R. 2d 609.

A pre-trial conference is more than a mere conference at which the court seeks to eliminate groundless allegations or denials and the court has the power to compel the parties to agree to all facts concerning which there can be no real issue. *Berger* v. *Brannan* (10 Cir.) 172 F. 2d 241, certiorari denied 337, U. S. 941; *McDonald* v. *Bowles*, *supra*. In the Berger case, the plaintiff had prepared a statement of sales and prices; the defendant urged that portions were omitted but failed to show wherein the statement was faulty; the trial court entered summary judgment, treating the plaintiff's statement as true. In affirming the judgment of the lower court, this court stated:

"Since the only issue between the parties was what material data was recorded on appellant's books

and since appellee had alleged that his Exhibit 'A' correctly reflected all pertinent data, the court was not required to stand by, permit appellant to rest on its general denial and await the outcome of a long expensive trial, to see whether such a denial was sustained."

In the present case, Aetna alleged in its amendment to its complaint for interpleader:

"That the annuity contract mentioned in its original complaint, No. AN 33409 . . . was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of the United States Government bonds mentioned in paragraph 13 of the amended petition filed by Leona Holcomb, et al. in Case No. 29092 in the District Court of Creek County and mentioned in paragraph 14 in the original petition filed by the plaintiff Leona Holcomb, et al. in Case No. 29092."

Intervenor F. E. Pence, the policy-writing agent of Aetna, alleged:

". . . The said bonds were converted into cash and the cash proceeds deposited in the First National Bank and Trust Company of Oklahoma City to the account of Rosa B. Wright Rettenmeyer. Thereafter, Joseph A. Rettenmeyer, under the power of attorney granted to him by Rosa B. Wright Rettenmeyer, drew a check or checks upon the account of Rosa B. Wright Rettenmeyer in payment of the premium or premiums on the Aetna Life Insurance Company annuity contract and insurance policy on the life of Donald George Fleming . . ."

To these complaints general denials were entered but throughout the proceedings *the fact that the proceeds of the bonds had been used to purchase the policies was apparently recognized by counsel on both sides.*

The state court action against Aetna was based on the theory of a principal's liability for its agent's acts and that complaint specifically alleges that F. E. Pence was acting within the scope of his employment.

Attorneys for Aetna offered to show the receipt of the money from the proceeds of the bonds and the payment of the premium in the account books of the Rosa B. Wright Rettenmeyer estate. Counsel for the defendants were willing to stipulate to what the record books would show.

Other statements by defendants' attorneys indicate that they *had no other theory of conversion than that Aetna had wrongfuly accepted payment for insurance policies:*

> ". . . let it suffice to say that we have filed suit in the District Court of Creek County, Oklahoma. Originally the suit was filed for conversion by fraud for damages for the taking of the money that ultimately wound up in what they refer to generally heretofore in this litigation as the big policy. That is, this policy with the $162,000 single premium."

And again:

> "They take those bonds that are non-negotiable and then have Mr. Pence execute a form whereby he purports to authorize exchange of those bonds for negotiable bonds, some that can be exchanged, and having exchanged the non-negotiable bonds for cash, and deposited that to her credit in the bank."

Despite all of these indications that *the suit in the state court was premised on a fraudulently executed insurance contract*, defendants' counsel insisted, when pressed by the court as to their position that "We don't know

what the Aetna did with the money. We say that Aetna's general agent went into this safety deposit box, and took the bonds—."

Under the circumstances, the trial court was justified in making the finding that the conversion complained of in the state court was an attack on the validity of the contract and a proper matter to be determined by an action in interpleader, in accord with the rule of *Berger* v. *Brannan*, *supra*.

Appellants had a second chance to defeat the interpleader action by showing that the money was actually converted by Aetna and the other defendants in the state court action and that Aetna's admission of the amount due under the contract was given in bad faith in order to avert liability for a greater amount as damages in conversion. Instead, however, they insisted on the validity of the contract in order to preserve its benefits to those of their number who were beneficiaries under the policies.

"If the consideration was wrongfully obtained, there was no meeting of the minds, the contract fails, and the estate of the promissee may seek rescission of the contract and any damages occasioned by the wrongful act of fraud or conversion. On the other hand, the estate may not contend that the contract is valid for the purposes of enforcement and assert at the same time that the vital part of the contract, the consideration, was not the bargained for price of the promise.

In all, appellants set forth *thirty-one assignments of error* many of which renew arguments considered upon the

first appeal and many of which appear to be *rejections of established law.* Although we have considered each such assignment we find no substance to the arguments advanced and *they merit little discussion.* Appellants, for example, would have us find fraud as a matter of law from the facts that Mrs. Rettenmeyer's will and ante nuptial contract evidence an intent to limit her bequest to her husband, whereas subsequently an annuity contract was obtained providing him with an income for life at a premium amounting to that which will ultimately be returned under the contract. Here again, appellants have ratified the contract by insisting that it is valid and enforceable.

Relying upon a single case, *Louther* v. *New York Life Ins. Co.* (3 Cir.) 278 F. 405, appellants urge that a court may not permanently enjoin a prior state court suit in an interpleader action. Suffice it to say that case interpreted law in effect in 1922 and the clear language of *28 U.S.C.A. 5361* authorizes the permanent injunction in an interpleader matter.

Appellants' complaints anent the lack of diversity jurisdiction apparently relate to the fact that the state court action involving the same parties could not be removed since Oklahoma residents were both parties defendant and plaintiff. Plaintiff Aetna brought its complaint in interpleader against claimants of diverse citizenship as required by 28 U.S.C.A. *1335.* All adverse claimants to the fund before the court in an interpleader suit need not be of diverse citizenship and *it is sufficient if the citizenship of more than one state is represented among the defendants.*

United States, et. al v. *Sentinel Fire Ins. Co.* (5 Cir.) 178 F. 2d 217. Further more, the permissive intervention of Oklahoma residents as parties will not divest the court of interpleader jurisdiction previously acquired. *Wichita P. & Light Co.* v. *Public Utilities Comm.*, 260 U. S. 48, S. Ct. 51, 67 L. Ed. 124.

Although the intervenors were not necessary parties to the interpleader action, the question of whether or not there had been a conversion of Mrs. Rettenmeyer's bonds by them was governed by the same facts and law determining Aetna's liability and the court properly allowed them to intervene, Federal Rules of Civil Procedure, Rule 24 (b) (2).

Affirmed.

APPENDIX.

Exhibit 2.

Federal Rules of Civil Procedure, Rule 16, 28 U. S. C. A.

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleading;

(3) The posibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action, at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

APPENDIX.

Exhibit 3.

Petition Filed in District Court, Tulsa County, Okla. (R. R. 32) *Holcomb, et al., vs. Aetna Life Insurance Company, et al.*, No. 87,402. (Filed April 15, 1954).

Come now the plaintiffs Mary Jane Hopkins, nee Wright, Leona Holcomb, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham, and for cause of action against the defendants Aetna Life Insurance Company, F. E. Pence, Joseph A. Rettenmeyer, in person and as guardian, agent, and attorney in fact for Rosa B. Wright, later Rettenmeyer, deceased, Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, a corporation, as such and as Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, and its officers and agents, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin W. Faherty, allege and state:

I. The plaintiff Mary Jane Hopkins, nee Wright, is the daughter of the said Rosa B. Wright (later Rettenmeyer). That plaintiffs Leona Holcomb, nee Denham, Ed, Frank, George and Clarence Denham were brought up in the home of the late Rosa B. Wright (later Rettenmeyer) and her husband, the late Cal Wright, both of whom are deceased. Rosa B. Wright was their aunt and foster mother. Donald George Fleming, a minor, is the ward of said Rosa B. Wright and her grand nephew. Said plaintiffs

hereinafter referred to as The Denham Heirs are all devisees under the Last Will and Testament of Rosa B. Wright Rettenmeyer, deceased, attached hereto and made a part hereof as "Exhibit A."

II. The defendant, The First National Bank and Trust Company of Oklahoma City, is a corporation duly organized and existing as such under the laws of the State of Oklahoma, engaged in general banking and in business as trustee and custodian for hire of the property of others, including the public generally. Said The First National Bank and Trust Company of Oklahoma City, in addition to its activities hereinabove recited, advertises for business as and represents itself to be specially qualfied to serve as administrator of the estate of deceased persons and executor of their wills. For the purpose of obtaining business of this character it retains and employs attorneys and agents who solicit and attempt to obtain for it appointments involving fidelity and trust as executors and administrators. At all times hereinafter complained of, said defendant The First National Bank and Trust Company of Oklahoma City was the duly designated Executor of the Estate of Rosa B. Wright Rettenmeyer, deceased, under the terms and conditions of her said Last Will and Testament. Subsequent to the death of Rosa B. Wright Rettenmeyer, said The First National Bank and Trust Company of Oklahoma City was by order of the County Court of Creek County, Oklahoma, in a proceeding therein instituted by it, designated and appointed executor of the will of said Rosa B. Wright Rettenmeyer, deceased,

which position of trust said corporation now occupies. A copy of said Letters Testamentary are hereto attached as a part hereof and marked "Exhibit B."

III. The defendants Virgil F. Sprankle, Grover D. Strother,, A. N. Murphey and Justin W. Faherty, were at all times hereinafter complained of officers and agents of said The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such and as the designated Executor of the Estate of Rosa B. Wright, later Rettenmeyer, deceased; that they were at all times herein referred to acting within the scope of their employment as such officers and agents and their acts were the acts of said corporation, The First National Bank and Trust Company of Oklahoma City.

IV. That at all times hereinafter complained of one Joseph A. Rettenmeyer was the second husband, attorney in fact, agent and/or guardian of the aforesaid Rosa B. Wright (later Rettenmeyer) and a devisee under the terms of her aforesaid Last Will and Testament to the extent of an undivided one-eleventh interest in her estate. Said Joseph A. Rettenmeyer was the step-father of plaintiff Mary Jane Hopkins, nee Wright. At all times hereinafter complained of and in committing the torts and converting the property hereinafter set forth, said Joseph A. Rettenmeyer acted in his own behalf and in behalf of and for his own children by another marriage, defendants Francis X. Rettenmeyer and Raymond Rettenmeyer, and his daughter-in-law defendant Marion Rettenmeyer; and said last named three defendants at all such times acted by and through said Joseph A. Rettenmeyer.

Copies of the three powers of attorney and the Letters of Guardianship under and behind which said defendant Joseph A. Rettenmeyer so acted and converted the property of said Rosa B. Wright are attached hereto as a part hereof and marked "Exhibits C. D. E, and F," respectively.

V. That the defendant Aetna Life Insurance Company is a foreign insurance company, duly incorporated as such and engaged in business in the State of Oklahoma. That the defendant F. E. Pence is and was at all times hereinafter complained of an agent of said Aetna Life Insurance Company, occupying a position as General Agent of said company within and for the State of Oklahoma and acting within the terms and scope of his agency as such that said F. E. Pence has long posed as a personal friend and private counsellor to said Rosa B. Wright (later Rettenmeyer).

VII. Plaintiffs aver further that upon the death of her first husband, the aforesaid Cal Wright, his widow, the aforesaid Rosa B. Wright (later Rettenmeyer) inherited under the terms if his Last Will and Testament an estate having a value in exess of $800,000.00. At about the time said estate was distributed to her, the defendant Joseph A. Rettenmeyer proposed to marry her; that since the said Joseph A. Rettenmeyer was then about 68 years old and the said Rosa B. Wright was then herself about to be her property rather than her affections, required said 67 years, she, the said Rosa B. Wright, fearing his object Joseph A. Rettenmeyer to make and execute an ante-nuptial

agreement, a true and correct copy of which is hereto annexed and made a part hereof as "Exhibit G," under and by virtue of the terms of which he solemnly and legally renounced and waived any claims to her property and estate growing out of or resulting from said marriage; that she thereafter made and executed in due form the Will heretofore set forth as Exhibit A, making ample provision for the said Joseph A. Rettenmeyer in the event of her death by devising to him as aforesaid an undivided one-eleventh of her estate, and devising to plaintiffs a just and equitable portion thereof, all as is more particularly set forth under the terms of said Will; plaintiffs further allege that certain codicils were thereafter executed to said Will, the same being identified as Exhibits H and I and made a part hereof. That neither of said codicils altered or modified the proportionate share and part of said estate devised to each devisee.

VIII. That subsequent to the execution of said antenuptial agreement and said Will and said codicils, and prior to her death, the said Rosa B. Wright(later Rettenmeyer) became incompetent and incapable as the result of weakness of mind and body of seeing after and attending to her own property and affairs; that as the result thereof she was obliged to and did make and execute in favor of said Joseph A. Rettenmeyer certain Powers of Attorney, copies of which are heretofore appended as Exhibits C, D and E, under and by virtue of the terms of which she turned over and delivered to him, subject to the limita-

tions and restrictions therein set forth, control of her property and estate; that thereafter on or about the 30th day of July, 1952, said Joseph A. Rettenmeyer instituted in the County Court of Creek County, Oklahoma, a proceeding to have said Rosa B. Wright (Rettenmeyer) adjudged incompetent, and to have himself made guardian of her person and estate; that a copy of the petition therein is hereto appended as a part hereof as Exhibit J; that under an order of the County Court of Creek County, a copy of which is hereto appended and made part hereof as Exhibit K, he was designated and appointed her guardian, and as such assumed direction and control over her person under Letters of Guardianship, a copy of which is appended as a part hereof as Exhibit F.

IX. Plaintiffs allege further that said ante-nuptial agreement and said Will and all codicils thereto were prepared by or under the directon of an attorney, to-wit, John Emby, who was attorney for the late Rosa B. Wright (later Rettenmeyer), and in whom she reposed special confidence and trust, and by members of the law firm with which he was associated, that is to say, the law firm of Embry, Johnson, Crowe, Tolbert and Boxley; plaintiffs further say that said attorneys and said law firm were attorneys also for defendant Aetna Life Insurance Company, F. E. enie and Joseph A. Rettenmeyer as agent of Rosa B. Wright (later Rettenmeyer) under the terms of the agency hereinabove referred to.

X. Plaintiffs say further that at the time of the appointment of said Joseph A. Rettenmeyer as Attorney in

Fact, agent and custodian of her property aforesaid, said Rosa B. Wright (later Rettenmeyer) owned and held U. S. Government Bonds, more particularly described as follows:

U. S. Treasury bonds 2 7/8ths-1955-1960	
No. 10065 E	$10,000.00
No. 10066 F	$10,000.00
No. 10067 H	$10,000.00
No. 10068 J	$10,000.00
No. 10069 K	$10,000.00
No. 10070 L	$10,000.00
No. 10071 A	$10,000.00
No. 10072 B	$10,000.00
No. 10073 C	$10,000.00
No. 10074 D	$10,000.00
No. 10075 E	$10,000.00
No. 10076 F	$10,000.00
No. 8730 L	$ 5,000.00
Series G June, 1944:	
No. X448354 G	$10,000.00
No. X448355 G	$10,000.00
No. X448356 G	$10,000.00
No. X448357 G	$10,000.00
No. X448358 G	$10,000.00
No. X448359 G	$10,000.00

Said bonds had been by her entrusted to the care and custody of the defendant The First National Bank and Trust Company, a corporation, and its officers and agents, defendants Virgil F. Sprankle, Grover D. Strother, A. N. Murphey and Justin W. Faherty, both in the capacity of

trustees for hire and as the designated Executor of the Will of said decedent Said bonds had a market value of $191,864.64, and were producing interest, which ws accruing to her use and benefit in the sum of $8,687.50 per year.

XI. Plaintiffs aver and allege that under the terms of the Will of the late Rosa B. Wright (later Rettenmeyer) and said Ante-Nuptial agreement hereinabove referred to, in the event of the death of the said Rosa B. Wright said bonds, or the value thereof, together with any unexpended portion of the increments and the profits therefrom, would have been divided one-eleventh to Joseph A. Rettenmeyer and seven-elevenths to the plaintiffs herein, onformable to the terms of the Will and codicils hereinabove referred to. Plaintiffs aver and state that all said defendants and the attorneys hereinabove referred to were fully informed of the facts and circumstances herein set forth.

XII. It was the duty of each of the defendants hereinabove named to preserve intact and with fidelity and care said property and the income and increment therefrom for the use and benefit of said Rosa B. Wright (later Rettenmeyer) in her lifetime and for disposition conformable to the terms of said antenuptial contract, her Last Will and Testament and the codicils thereto in event of her death.

XIII. Plaintiffs further say that in breach of trust and violation of law said defendants, acting jointly and severally and in furtherance of a common design and purpose, did on or about the 31st day of October, 1950, secretly and surreptitiously enter the safety deposit box of said

Rosa B. Wright in The First National Bank and Trust Company of Oklahoma City, and without authority of law wrongfully and illegally take, steal and carry away therefrom the U. S. Government Bonds hereinabove set forth and did wrongfully endorse, or cause to be endorsed thereon, an "X" pupporting to be an act of said Rosa B. Wright Rettenmeyer, procure the cash value thereof, and convert the same to their own use and benefit to the damage and detriment of said Rosa B. Wright Rettenmeyer, her heirs, devisees and assigns, in the sum of $191,864.64.

XIV. Plaintiffs aver further that sad acts were done surreptitiously and secretly; that the knowledge of said transactions was secreted from said Rosa B. Wright Rettenmeyer in her life time; that if she had any notice or knowledge thereof, which is by plaintiffs specifically denied, she was so kept, controlled and dominated by the defendants, their agents and servants, and so incapacitated in mind and body and incapable by virtue of guardianship Powers of Attorney, and secret control of her own attorneys by said defendants that she was powerless to act in her own behalf.

XV. Plaintffs aver and allege that said Rosa B. Wright Rettenmeyer departed this life on or about the 13th day of December, 1952. Thereafter the defendant, The First National Bank and Trust Company of Oklahoma City, Oklahoma, a corporation, by said law firm of Embry, Crowe Tobert, Boxey and Johnson, immediatey instituted a proceeding for the appointment of said defendant bank as executor of said estate; that by virtue of the collusion of said

defendants hereinabove named, and each of them, in the wrongs hereinabove complained of and their interst therein, said defendant The First National Bank and Trust Company of Oklahoma City, a corporation, in its capacity as such, and as Executor of the Estate of said Rosa B. Wright Rettenmeyer, and its attorneys, have failed and refused and continue to fail and refuse to institute and prosecute a suit of any kind or character for the recovery of said assets of said estate and increment or profit or any part thereof; that on the contrary, they conspired together to conceal and secret the true facts respecting the conversion of said property and assets. Plaintiffs, although diligently endeavoring so to do, were unable to discover the facts hereinabove set forth until less than one year prior to the day and date of instituting this proceeding.

XVI. Plaintiffs further allege that the defendant Joseph A. Rettenmeyer has repudiated and breached the terms of the Will and codcils thereto of said Rosa B. Wright (later Rettenmeyer) by virtue of which act and conduct he has forfeited all rights vested in him and those claiming by, through or under him in or to any part or portion of the estate of said deceased, including specifically the moneys and property hereinabove referred to and the claims asserted hereunder.

XVII. Plaintiffs further assert that by virtue of the wrongs herein complained of they as devisees and heirs under the Will and codicils of said Rosa B. Wright (later Rettenmeyer) have suffered and sustained damages in the sum of $191,864.64 together with interest at the rate of 6% per annum thereon from the date of said converson to

this date in the further sum of $39,487.30; that said damages resulted from the fraud, oppression and malice of defendants by virtue of which plaintiffs are entitled to exemplary and punitive damages in the further sum of $231,351.94.

Wherefore, premises considered, plaintiffs bring this suit and pray judgment against said defendants and each of them jointly and severally and in favor of plaintiffs and said estate of Rosa B. Wrght (later Rettenmeyer) deceased, as their respective interests appear, for the sum of $231,351.94, together with interest thereon at 6% per annum until paid, as actual damages ,and for the further sum of $231,351.94 as exemplary and punitive damages, together with all costs of this action.

Young, Young & Young
By (s) Glenn A. Young
Attorneys for Plaintffs
George Denham, Clarence Denham and Mary Jane Hopkins, nee Wright.

H. K. Glunt and Young, Young & Young.
By: (s) Glenn A. Young,
H. K. Glunt.
Attorneys for Plaintiffs Leona Holcomb, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, and Frank Denham.

Attorneys Lien Claimed Young, Young & Young and H. K. Glunt.

APPENDIX.

Exhibit 4.

For copy of application for insurance policy see reproduction at end of appendix.

APPENDIX.

Exhibit 5.

Material Excerpts from Pre-Trial Conference.

(Record, pages 141-144.)

Aetna Life Insurance Co., et al., v. *Fleming, et al.*

Mr. Glenn O. Young: Is Your Honor mindful of the fact that we have generally denied all Aetna asserts?

The Court: Yes, I think I am.

Mr. Glenn O. Young: And specifically denied it?

The Court: I think I am aware of that.

Mr. Glenn O. Young: I want Your Honor to understand now, if there is an doubt about it, so the record may be clear, that we contest every statement that Mr. Aetna —Mr. Woolsey has made in his opening statement to this Court—we contest them all.

The Court: Do you take the position that the burden is on you under the state of these pleadings to affirmatively establish the circumstances under which these bonds were cashed and the proceeds used?

Mr. Woolsey: Not now, Your Honor, in view of the fact of what Mr. Young has stated, that none of the heirs, or none of the Denhams, or none of the beneficiaries of the policies—either policy takes the position that the contracts

are invalid; in other words, my position now is simply this: You can't eat your cake and have it too. That either the contracts are valid or they are invalid. If they are valid, Aetna can retain the premiums. You have gotten now from a statement of counsel a ratification by the Denham heirs of these contracts under the same—they now assert in this Court that they stand ready, willing and able to receive their part of the money. They don't claim it, but they say that they are willing to accept it, and therefore they are in no better position than Rosa B.—

The Court: I don't believe there is anything left to try; I think this case is now ripe for entry of judgment.

Mr. Woolsey: I am inclined to agree with Your Honor. It is a proposition that—they have ratified the contract by their statement, and I tender in open court payment of both the amount due under these contracts, and annuities, to the Denham heirs, together with accrued interest—I tender it in open court.

The Court: All right, I am going to enter judgment accordingly in both cases on both contracts, of course—with respect to the contract of which Fleming is the beneficiary there will be a declaratory judgment that the contract is valid and in full force and effect, and that Aetna will be required to pay to Fleming in accordance with the terms thereof, or to the beneficiaries in accordance with the terms thereof, and I believe the only—Donald George Fleming is the——

Mr. Woolsey: He is the beneficiary.

The Court: Beneficiary under the contract.

Mr. Glenn O. Young: Under the Donald George Fleming contract we would like a special finding that that contract was applied for by Donald George Fleming, a minor, and that the name of Rosa B. Wright Rettenmeyer does not appear on either the application or the policy.

Mr. Landa: Yes, it does.

Mr. Glenn O. Young: That is her name——

The Court I don't think it necessary to make any special finding on that proposition.

Mr Landa: The payment of that is according to its terms.

The Court: The Court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined from prosecuting that suit upon the theory that the action is barred under the principles of res adjudicata

Mr. Glenn O. Young: Will Your Honor make a finding on the question of the jurisdiction of this Court in an action wherein interpleader—there is no diversity of citizenship as between the interpleaders and the parties defendant in that lawsuit.

The Court: You may prepare appropriate decree in accordance with the views indicated.

Mr. Woolsey: Very well.

The Court: That's all.

Mr. Allen: Your Honor, we would request a special finding on behalf of Joseph A. Rettenmeyer that at the time of the purchase of both of these annuities Rosa B. Wright Rettenmeyer was competent and fully capable to transact and manage her own affairs, and was in no way overreached or defrauded in these transactions.

The Court: That issue has not been tendered here. There is no occasion for me to make a finding——

Mr. Allen: If I understand then the Court refuses to make such a finding solely because no such issue has been tendered, is that correct?

The Court: Everybody takes the position here now at this hearing this morning that this is a valid contract, and

the proceeds of the contract should be paid to the beneficiaries; and that is the reason I am entering the judgment that I am entering here at this time.

Mr. Allen: All right, Your Honor.

Mr. Glenn O. Young: Your Honor, let us save an exception on the record, both to refusal to make findings of fact on jurisdictional issues, and the refusal to make special findings of fact on the issues in controversy, and to the judgment of the Court as entered and the findings as made in the judgment.

The Court: This amendment to the answers of the defendants which you tendered for filing may be filed.

That's all.

Filed April 15, 1957.

Decree. (Case No. 3502)

Now, on this 10th day of December, 1956, the above cause of action came on for pre-trial hearing. The Plaintiff, Aetna Life Insurance Company, a corporation, appeared by Robert M. Woolsey and Thomas W. Brown of Farmer, Woolsey, Flippo & Bailey; its attorneys; the defendants, Leona Holcomb individually, Leona Holcomb as guardian of the person of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Gladys Denham Lumley, and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, appeared by H. K. Glass, Glenn O. Young, Glenn A. Young, and David Young, their attorneys; the defendants, George Denham, Clarence Denham, Mary Jane Hopkins nee Wright, and Mary Ellen Cash appeared by Glenn O. Young, Glenn A. Young and David

Young, their attorneys; Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, Louis Denham, Marion Denham, and Rufus Denham by Moraul Bosonetto, their attorneys; the intervenors, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer deceased, appeared by Sam T. Allen III, his attorney; the intervenor F. E. Pence appeared by Philip N. Landa of the firm of Rhodes, Crowe, Hieronymus and Holloway, his attorneys; the intervenors Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin W. Faherty appeared by Joseph A. Sharp of the firm of Rucker ,Tabor & Cox of Tulsa, Oklahoma, but on behalf of the firm of Cochran, Dudley, Fowler, Rucks, Baker & Jopling of Oklahoma City; the intervenor First National Bank & Trust Company of Oklahoma City appeared by Joseph A. Sharp of the firm of Rucker, Tabor & Cox and by Ann Otter of the firm of Looney, Watts, Ross, Looney & Smith, its attorneys.

The Court Finds, having considered the statements of counsel, and the pleadings in said cause, as follows:

That the Plaintiff, Aetna Life Insurance Company, is a corporation and it was such a corporation at the time of filing the action, organized and existing under the laws of the State of Connecticut, and that it is duly authorized and licensed to transact insurance business in the State of Oklahoma and is a citizen of the State of Connecticut.

The Court Further Finds That the Defendants, Leona Holcomb individually, and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham,

George N. Denham, Leona Denham Holcomb and Mary Jane Hopkins at the time of the filing of this action were citzens and residents of the State of Oklahoma.

The Court Finds Further That Edward Denham at the time of the filing of the above action was a citizen and resident of the State of Oklahoma, but that he has since died and that his heirs are his widow, May Cecilia Denham, and his daughters, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, and that this action has heretofore been revived in the name of the heirs of Edward Denham.

The Court Further Finds That the Defendant Raymond D. Rettenmeyer is a citizen and resident of the State of New York and that the Defendant Francis X. Rettenmeyer is a citizen and resident of the State of New Jersey, and that the Defendant Marion Rettenmeyer is a citizen and resident of the State of Oregon.

The Court Further Finds That the Defendant Louis Denham is a citizen and resident of the State of Idaho and the Defendant Marion Denham is a citizen and resident of the State of Washington.

The Court Finds Further That in the Complaint for interpleader filed herein, it is alleged by the Plaintiff that the Defendant Rufus Denham is a citizen and resident of the State of Washington, which allegation is denied by certain of the Defendants as appears from the answers filed herein. The Court finds that under the appropriate acts of Congress pertaining to interpleader that the requisite diversity of citizenship exists and that this Court has

jurisdiction of the parties and the subject matter of the action and that this is an action in the nature of interpleader.

The Court Further Finds That on the 9th day of December, 1950, on application of the said Rosa B. Wright Rettenmeyer, the plaintiff made, executed and delivered its certain single premium annuity Contract No. AN33409 being the annuity contract heretofore referred to in the Plaintiff's Complaint in interpleader upon payment to it of funds of the said Rosa B. Wright Rettenmeyer in the sum of $162,606.00. That the Defendants, Mary Jane Hopkins nee Wright, Leona Holcomb, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham, in Cause No. 87402, in their Amended Petition filed in the District Court of Tulsa County, State of Oklahoma, claim that certain United States Bonds as described in their Petition of a total face value of $185,000.00, and having a market value of $191,864.64, were converted by the Defendants Aetna Life Insurance Company, F. E. Pence, Joseph A. Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, Virgil F. Sprankle, Grover D. Strothers, A. N. Murphy and Justin W. Faherty.

The Court Further Finds from the pleadings that $162,606.00 of the proceeds of said bonds were used to pay the premium on Policy No. AN33409 above referred to.

The Court Further Finds That on or about the 27th day of October, 1950, the plaintiff made, executed and de-

livered a certain policy of insurance, No. N1669203 on the life of Donald George Fleming, which policy appears as an exhibit to Plaintiff's Complaint in Cause No. [illegible] filed in this Court, which policy provides for payment on the death of Donald George Fleming of the proceeds of the policy to Joseph A. Rettenmeyer, uncle of the insured, otherwise to Rosa B. Wright Rettenmeyer, aunt of the insured, if she survived the insured, otherwise to the Executors and Administrators of the insured as provided in the policy, and said policy was issued in exchange for the payment by Rosa B. Wright Rettenmeyer through Joseph Rettenmeyer as her attorney-in-fact of the sum of $25,143.03 premium paid out of the funds of Rosa B. Wright Rettenmyer obtained from the cashing of the bonds heretofore mentioned.

The Court Further Finds that the Defendants, Frank T. Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Leona Denham Holcomb as guardian of Donald George Fleming, Donald George Fleming, a minor, Mary Jane Hopins and the Defendant's heirs of Edward Denham, to-wit, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley and May Cecelia Denham as guardian of Dorothy Lee Denham, a minor, in their pleadings and in open court by their counsel, assert that they make no claim as to the invalidity of the annuity Contract No. AN33469 hereinafter referred to, and that they make no claim as to the invalidity of the insurance contract No. N1669203 hereinafter referred to, but state that said insurance contracts are now incon-

testable and are valid contracts and are due and payable and that said contracts should be paid according to their terms. And further that said Defendants, through their counsel, state that there was no controversy between anybody as to the issuance of the policy and that there is no conflict among the parties who are designated as annuitants as to which one receives what payments are due under the policies and that the identity of the beneficiaries under the policy is established and that none of said beneficiaries are contending that the policy is invalid and that they are not asking for a refund of any premiums that were paid prior to the date of the death of Rosa B. Wright Rettenmeyer.

The Court Further Finds That said Defendants on request of the Court declined to assert any claim or tender any issue for conversion of the bonds in this cause and stated in open court that the Defendants' pleadings measured their claims in the United States Court accurately and carefully and thereon the Court, having considered all the pleadings heretofore filed and the statement of counsel, finds that there remains no issue of fact to be tried in the present case and that judgment should be rendered for the Plaintiff as hereinafter set forth.

Th Court Further Finds That none of the other beneficiaries who are Defendants in the above captioned cause make a claim that said policy or annuity contract is invalid.

The Court Further Finds That none of the Defendants assert or make any claim or tender any issue for the conversion of the bonds as alleged in the Petition attached as an exhibit in Cause No. 87042 in the District Court of Tulsa County, which cause of action is still pending in the District Court of Tulsa County.

The Court Further Finds That at the time of filing the Complaints in interpleader and the amendment thereto, the Defendants, Ellen Cash, Marion Rettenmeyer, Rufus Denham, Marion Denham, Louis Denham, Frank S. Rettenmeyer, Raymond D. Rettenmeyer, were claiming and in their answers filed herein claimed the payments due them as contingent beneficiaries under the annuity Contract No. AN33409, and that the claims for conversion of the bonds asserted in Cause No. 87042 and the claims for payments under the policy were conflicting and adverse and the plaintiff was unable to determine the validity of those claims and the rights of the claimants as between themselves, and the Plaintiff could not, without hazard to itself, undertake to decide as to the validity or superiority of the conflicting claims of the Defendants.

The Court Further Finds That Rosa B. Wright Rettenmeyer died on December 13, 1952, and that Joseph A. Rettenmeyer, contingent beneficiary, died on March 22, 1954, and that Aetna Life Insurance Company repaid under its annuity contract the sum of $39,060.00 to Rosa B. Wright Rettenmeyer to Joseph A. Rettenmeyer, attorney-in-fact for Rosa B. Wright Rettenmeyer, Guy L. Barry, guardian of the Estate of Rosa B. Wright Rettenmeyer, and

Joseph A. Rettenmeyer, all as beneficiaries or annuitants under said annuity contract, and that the contingent beneficiaries named in said policy who are defenders to the above captioned action are entitled to be paid pursuant to the terms of the policy payments from the first day of April, 1954.

The Court Further Finds That because of the conflicting claims of the parties the Plaintiff should not be compelled to determine the rights of the parties and that there was a danger that Plaintiff would have been involved in a multiplicity of suits and put to unnecessary costs and expenses on account of conflicting and adverse claims

The Court Further Finds That upon the institution of the above styled action the Plaintiff filed with the Clerk of this Court a bond to abide by the judgment of this Court which bond was approved by the Court.

It Is Therefore Ordered, Adjudged And Decreed That the Plaintiff herein have a judgment determining that the contract of annuity No. AN33409 is a valid annuity contract and that the proceeds of the contract should be paid to the Defendants named as beneficiares therein, namely Ellen Cash, Rufus Denham, Marion Denham, Louis Denham, Marion Rettenmeyer, Frank X. Rettenmeyer, Raymond D. Rettenmeyer, Frank T. Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins and the payment due Edward Denham be paid to his heirs May Cecilia Denham, his widow, and to May Cecilia Denham, guardian of Dorothy Lee Denham, a minor and to Carolyn Denham Lumley, said payments to be retroactive to April 1, 1954.

It Is Further Ordered, Adjudged And Decreed By The Court that the Defendants, Leona Holcomb individually, and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, and May Cecilia Denham individually and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, be and they are hereby perpetually enjoined and restrained from making any further claims against the plaintiff and against the intervenors, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, The First National Bank & Trust Company of Oklahoma City, F. E. Pence, Virgil Sprankle, Grover D. Strother, A. N. Murphy,and Justin W. F. herty, on account of the alleged conversion of the bonds mentioned in their Petition in Cause No. 87042 in the District Court of Tulsa County, and they are perpetually enjoined and restrained from proceeding further in Cause No. 87042 in the District Court of Tulsa County against the Plaintiff, Aetna Life Insurance Company, and against the intervenors, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, The First National Bank & Trust Company of Oklahoma City, F. E. Pence, Virgil Sprankle, Grover D. Strother, A. N. Murphy, and Justin W. Faherty.

Royce H. Savage, Judge

Filed Jan. 14, 1957.

Case No. 3503.

Journal Entry Of Declaratory Judgment.

Now, on this 10th day of December, 1956, the above cause of action came on for pre-trial hearing. The plaintiff, Aetna Life Insurance Company, a corporation, appeared by Robert J. Woolsey and Thomas W. Brown of Farmer, Woolsey, Flippo & Bailey, its attorneys; the defendants, Leona Holcomb individually, Leona Holcomb as guardian of the person of Donald George Fleming, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, and May Cecilia Denham as guardian of Dorothy Lee Denham a minor, appeared by H. K. Glunt, Glenn O. Young, Glenn A. Young, and David Young, their attorneys; and the defendants George Denham, Clarence Denham, Mary Jane Hopkins, appearing by Glenn O. Young, Glenn A. Young, and David Young, their attorneys, and the intervenor F. E. Pence appearing by Philip N. Landa of the firm of Rhodes, Crowe, Hieronymus & Holloway, his attorneys, the Court finds, having considered the statements of counsel and the pleadings in said cause as follows:

That the Plaintiff, Aetna Life Insurance Company, is a corporation and it was such a corporation at the time of filing the action, organized and existing under the laws of the State of Connecteut and that it is duly authorized and licensed to transact business in the State of Oklahoma and is a citizen of the State of Connecticut. The Court further finds that the Defendants, Leona Holcomb individually and

Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, Leona Denham Holcomb and Mary Jane Hopkins, Edward Denham were at the time of filing the action, citizens and residents of the State of Oklahoma.

The Court Finds Further that Edward Denham had died since the institution of this action and his heirs are his widow May Cecilia Denham and his daughters, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, and that May Cecilia Denham is the duly appointed and acting guardian of Dorothy Lee Denham, a minor, and that this action has heretofore been revived in the name of the heirs of Edward Denham.

The Court Further Finds F. E. Pence is a citizen of the State of Oklahoma and was such a citizen at the time of the filing of the action.

The Court Finds Further That under the appropriate acts of Congress pertaining to declaratory judgments and interpleader that the requisite diversity of citizenship exists between the plaintiff and Defendants and the intervenor, and that this Court has jurisdiction of the parties and the subject matter of the action and that a justiciable controversy exists between the Plaintiff and the Defendants involving the rights and liabilities under the contracts of insurance set forth in the pleadings.

The Court Finds That on the 27th of October, 1950, on application of one Donald George Fleming, the defendant herein, a minor of eleven years of age, the plain-

tiff Aetna Life Insurance Company made, executed and delivered its certain annuity insurance contract No. N1669203, being the insurance annuity contract heretofore referred to in plaintiff's Complaint for Declaratory Judgment and for interpleader under Rule 22 and in the amendment to the complaint for interpleader upon payment to it of funds of the said Rosa B. Wright Rettenmeyer in the sum of $25,143.03. That the Defendants Mary Jane Hopkins nee Wright, Leona Holcomb,& Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Ed Denham, Frank Denham, George Denham and Clarence Denham in Cause No. 87402 in their Amended Petition filed in the District Court of Tulsa County, State of Oklahoma, claimed that certain United States Bonds belonging to Rosa B. Wright Rettenmeyer as described in their Petiton of a total face value of $185,000 and having a market value of $191,864.64 were converted by the Defendant, Aetna Life Insurance Company and the intervenor, F. E. Pence, who is one and the same F. E. Pence as is set forth in the application signed by Donald George Fleming attached to annuity insurance Contract No. N1669203.

The Court Further Finds from the pleadings that $25,143.03 of the proceeds of said bonds were used to pay the premium on policy No. N1669203.

The Court Further Finds That on the 9th day of December, 1950, on application of the said Rosa B. Wright Rettenmeyer the Plaintiff made, executed and delivered its certain single premium annuity contract No. AN33409,

which contract appears as an exhibit to Plaintiff's Complaint in Cause No. 3502 filed in this Court, being the annuity contract heretofore referred to in Plaintiff's Complaint in Cause No. 3592, upon payment to it of the funds of the said Rosa B. Wright Rettenmeyer in the sum of $162,606.00.

The Court Further Finds That the Defendants Frank T. Denham, Clarence N. Denham, George N. Denham, Leona Denham Holcomb, Leona Denham Holcomb as guardian of Donald George Fleming, a minor, Mary Jane Hopkins and the Defendants, heirs of Edward Denham, to-wit: May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, in their pleadings and in open court by their counsel, assert that they make no claim as to the unvalidity of the insurance contract No. N669203 hereinabove referred to, and assert further they make no claim as to the invalidity of annuity Contract No. AN33409 hereinbefore referred to, but state that said insurance and annuity contracts are now incontestable and are valid contracts and are due and payable according to the terms of said contracts and further that said Defendants, through their counsel, state that there was no controversy between anybody as to the issuance of the policy and that there is no conflict among the parties as to who receives the payments due under said contracts of insurance, and that the identity of the beneficiaries under the policies is established and that no one is contending that the policies are invalid and that they

the said defendants, are not asking for a refund of any premiums that were paid prior to the date of the death of Rosa B. Wright Rettenmeyer.

The Court Further Finds That the said Defendants, on request of the Court declined to assert any claim for conversion of the bonds in this cause, and stated in open court that the defendants' pleadings measured their claims in the Unted States Court accurately and carefully, and thereupon the Court, having considered all the pleadings heretofore filed and the statements of counsel, finds that there remains no issue of fact to be tried in the present cause and that judgment should be rendered for the Plaintiff as hereinafter set forth.

The Court Further Finds That the Beneficiary and life owner presently of the policy, towit: Donald George Fleming, makes no claim that the insurance policy or annuity Contract No. N1669203 is invalid.

The Court Further Finds That none of the Defendants assert or make any claim or tender any issue in this Court for the conversion of the bonds as alleged in the Petition attached as an exhibit in Cause No. 87042 in the District Court of Tulsa County, which cause of action is still pending in the District Court of Tulsa County.

The Court further Finds That at the time of filing the Complaint in interpleader and the amendment thereto, and Complaint for Declaratory Judgment, the Defendants herein in Cause No. 87042 asserted claims for conversion of the bonds and that in an action in this Court Donald

George Fleming now claims that the policy is valid and also claims a cause of action in Cause No. 87042 in the District Court of Tulsa County, sounding in conversion for converting the bonds, the proceeds of which went to purchase said Policy No. N1669203 and that such claims were conflicting and adverse and that this Court finds that the plaintiff is entitled to the declaratory relief demanded in the Complaint.

The Court Further Finds That Rosa B. Wright Rettenmeyer died on December 13, 1952, and that Joseph A. Rettenmeyer died on March 22, 1954.

It Is Therefore Ordered, Adjudged and Declared that the contract of insurance No. N1669203 wherein Donald George Fleming is the insured, is declared to be a valid contract and in full force and effect and the Plaintiff is ordered and directed to pay to the said Donald George Fleming the payments set forth in the policy in accordance with the terms thereof when due.

It Is Further Ordered, Adjudged and Decreed that Leona Holcomb individually and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, and Mary Jane Hopkins and May Cecilia Denham individually and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, Dorothy Lee Denham, a minor, and Carolyn Denham Lumley, heirs of Edward Denham, be and they are hereby perpetually enjoined and restrained from making any further

claims against the Plaintiff and against the intervenor F. E. Pence, on account of the alleged conversion of the bonds or conversion of the funds that went to purchase the insurance Contract No. N166203 herebefore referred to, and they are perpetually enjoined and restrained from proceeding further in Cause No. 87042 in the District Court of Tulsa County.

Royce H. Savage,
District Judge.

Filed Jan. 14, 1957.

Donald George Fleming

Single

Single

Single